International Trade

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I. Introduction

The year 2003 saw significant developments in the field of international trade. Ongoing negotiations at the World Trade Organization (WTO) and to establish a Free Trade Area of the Americas (FTAA) collapsed this year due to differences among the parties as to the desired scope of the negotiations. In contrast, the United States made significant progress and continued to pursue negotiations on bilateral free trade agreements (FTA) with several countries.

Dispute settlement at the WTO continued to be the source of significant developments and controversy. Nowhere was this more evident than in the appeal of the United States' steel safeguard measure and the threats of immediate retaliation against the United States that several of the complaining parties brought in that case, particularly the European Communities (EC). Implementation of adverse WTO decisions and retaliation against the United States were also hot topics in several other cases. Additionally, the United States continued to criticize the decisions issued by WTO Panels and the Appellate Body for exceeding their mandate and finding obligations not present in the applicable WTO agreements.

In U.S. trade remedy litigation, the mid-term review of the steel safeguard measure and the investigation of the impact of the safeguard tariffs on domestic consumers of steel were the most significant events in 2003. The United States also conducted several significant and high-profile antidumping and countervailing duty investigations. Moreover, due to soaring imports of numerous products from China and the resultant heightening of trade tensions between China and the United States, numerous antidumping petitions and several China-specific safeguard proceedings were filed against the country in 2003.

Legislative activity in the field of international trade was relatively modest in 2003. Although members of Congress started the year with high hopes for several pieces of legislation, the implementing bills for the Chile and Singapore FTAs were the only major trade legislation enacted into law.

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II. Negotiating Developments

The WTO Doha Round Negotiations collapsed in September during the fifth ministerial conference in Cancun, Mexico, most directly due to the so-called "Singapore issues." The negotiations for a FTAA among thirty-four Western Hemisphere countries likewise stalled due to disagreements between the United States and its co-chair, Brazil, over the scope of the FTAA. Due to these developments, the deadlines for completion of both sets of negotiations became increasingly unrealistic. While the WTO and FTAA negotiations stalled, U.S. trade officials directed most of their efforts toward negotiations on bilateral FTAs with several countries, yielding one of the year's few bright spots on the negotiations front.

A. World Trade Organization Developments

1. *Doha Round Negotiations*

In September, the Cancun Ministerial was called to set the framework for future negotiations in the Doha Round, which was due to conclude by the end of 2004. With the collapse of the Cancun Ministerial, the deadline is now in serious jeopardy.[1]

The Ministerial ended on September 14, 2003, after African countries refused to agree to launching new negotiations on trade facilitation, one of the four "Singapore issues." A group of twenty-one developing countries from Africa, South America, the Caribbean, and the Pacific—the "G-21 countries"—had long demanded significant cuts in agriculture subsidies and tariffs by the developed countries. Additionally, they resisted efforts by the EC, Japan, and other nations to launch talks on the four "Singapore issues" of investment, competition policy, trade facilitation, and transparency in government procurement. At the Ministerial, the G-21 countries were unwilling to allow negotiations to move beyond agricultural issues to the "Singapore issues."[2]

The EC had made a major, last-minute concession by agreeing to completely drop its demand for negotiations on two of the Singapore issues—investment and competition policy[3]—and allowing talks on the other two issues to proceed. However, that concession was not enough for the G-21 countries, which complained that they were being asked to shoulder even greater trade liberalization responsibilities without knowing what they would gain on issues of interest to them, notably agriculture. In particular, the developed countries had not offered the prospect of sufficient reductions in export subsidies and trade-distorting domestic subsidies for cotton.[4]

After the Cancun Ministerial, WTO members sought to put the Doha Round negotiations back on track.[5] The by then G-20 group of developing countries met in Brasilia on December 11–12, 2003, joined by both WTO Director-General Supachai Panitchpakdi and EC Trade Commissioner Pascal Lamy. Focusing on the issue of agricultural talks,

1. *WTO Talks Crashed When Developing Nations Balked at Taking up Some "Singapore Issues,"* 20 Int'l Trade Rep. (BNA) No. 37 at 1533 (Sept. 18, 2003).

2. *Id.*

3. This so-called "unbundling" of the Singapore issues, pushed by the United States, had been hoped to allow the less contentious of the four issues—trade facilitation and transparency in government procurement—to proceed to the negotiating phase.

4. *WTO Talks Crashed When Developing Nations Balked at Taking up Some "Singapore Issues,"* *supra* note 1, at 1533.

5. *Id.*

Supachai urged flexibility from all sides. The resulting joint statement noted that the parties had engaged in "fruitful" discussions and agreed to intensify talks early in the new year to move the Doha Round forward. While the meeting gave a symbolic boost to the Doha Round and the relations between the G-20 and the EC, no substantive results or concrete compromises were reached.

WTO members met on December 15–16, 2003, in the last General Council (GC) session of the year and agreed to reactivate the Trade Negotiations Committee and its auxiliary negotiating bodies. Although the mood of the meeting was reportedly positive, the outcome was limited and focused on procedure rather than substance. GC Chairman Carlos Perez del Castillo had been consulting with WTO members and signaled in December that the United States and the EC would have to agree to more reductions in domestic farm support than were envisioned in the draft ministerial declaration circulated in Cancun in order to reach an agreement on a framework for furthering negotiations on agriculture. Castillo indicated that the Cancun draft had been used as a starting point for his consultations with members and that negotiating groups should pick up from where those consultations ended.[6]

2. *Accession to the WTO*

a. New Accessions

The Republic of Armenia became a member of the WTO on February 5, 2003.[7] In addition, ratification of the Protocol of Accession by its parliament, the Former Yugoslav Republic of Macedonia became the 146th member of the WTO on April 4, 2003.[8]

b. Ongoing Accession Negotiations

As of the end of 2003, twenty-seven countries were in negotiations to become members of the WTO. These were (in the order of their date of application): Algeria, Nepal, the Russian Federation, Saudi Arabia, Belarus, Ukraine, Sudan, Cambodia, Uzbekistan, Vietnam, Seychelles, Tonga, Kazakhstan, Azerbaijan, Andorra, Lao People's Democratic Republic, Samoa, Lebanese Republic, Bosnia Herzegovina, Bhutan, Cape Verde, Yemen, Serbia and Montenegro, Bahamas, Tajikistan, and Ethiopia.[9] Of these, only Ethiopia made its request for accession in 2003.[10]

Negotiations on two accessions made progress during 2003. On September 11, 2003, the WTO Ministerial Conference approved the accession packages for Cambodia and Nepal. After their legislatures ratify the agreed terms and inform the WTO, Cambodia and Nepal will become the 147th and 148th members, respectively, of the WTO. They will also be the first least-developed countries (LDCs) to join the WTO through the full working party negotiation route.[11] The swift conclusion of Cambodia's membership negotiation has been

6. *Castillo Signals U.S, EU Have to Move Further on Agriculture*, INSIDE U.S. TRADE (Dec. 19, 2003), *at* http://www.insidetrade.com.

7. The accession package was approved on December 20, 2002. WTO, *New requests and completed accessions, available at* http://www.wto.org/english/thewto_e/acc_e/newrequest_e.htm.

8. The accession package was approved on October 15, 2002. WTO, *WTO News: WTO membership rises to 146*, Apr. 4, 2003, *available at* http://www.wto.org/english/news_e/news03_e/acc_macedonia_4apr03_e.htm.

9. *Id.*

10. WTO, *New requests and completed accessions, supra* note 7.

11. WTO, *WTO News: Ambition achieved as ministers seal Cambodia membership deal*, Sept. 11, 2003, *available at* http://www.wto.org/ english/news_e/pres03_e/pr354_e.htm; WTO, *WTO News: WTO Ministerial Conference approves Nepal's membership*, Sept. 11, 2003 *available at* http://www.wto.org/ english/news_e/pres03_e/pr356_e.htm.

attributed to the new guidelines for LDC accession, which were approved by WTO members in December 2002 and were designed to facilitate LDCs in their accession process.[12]

c. Russia's Accession Negotiations

On December 18, 2002, the Working Party on the accession of the Russian Federation to the WTO agreed on an accelerated work program for 2003, raising the hope that all of the necessary negotiations might be finished before the WTO Ministerial in Cancun. Despite this optimism, each round of talks ended with few signs of progress, eliminating any possibility of reaching a final accession deal by the end of 2003.[13]

The last round of negotiations in 2003 failed to resolve the differences between Russia and WTO members on key issues. Discussions at the bilateral and the multilateral levels in December focused in particular on the service sector, where Russia continued to resist demands from WTO members for improved commitments on opening up its financial services and telecommunications markets to foreign operators. For example, Russia has refused to allow foreign banks to open branches in the country.[14] Another difficult issue is Russia's tariff-rate quotas on agricultural imports introduced earlier in the year. In bilateral talks, the United States made a deal with Russia in late September that ensured that the U.S. country quota allocations for poultry, beef, and pork would maintain previous market access levels for American exporters. Other agricultural exporting members, however, continue to urge that the country allocations be removed and replaced with a specific global quota or tariff-only measures.[15]

3. *OECD Steel Negotiations*

The negotiations among thirty OECD member states and major steel producing nations from the developing world have two goals: (1) to curb steel production capacity through mutual agreements and peer monitoring that is to be managed by a capacity working group; and (2) to eliminate trade-distorting subsidies through a binding agreement that is to be managed by the Disciplines Study Group (DSG). The capacity working group has identified 140 million tons of economically inefficient capacity to be eliminated by 2005. In addition, the DSG has been holding regular meetings since early 2003 for negotiations on the steel subsidies agreement.[16]

It was not until October 2003, however, that negotiators began to scratch the surface on the most contentious issues for the steel subsidies agreement. These consist principally of exceptions to the subsidy ban and the special and differential (S&D) treatment to be accorded to the developing countries participating in the talks. The United States has advocated limiting the exceptions to the subsidies ban and S&D treatment for developing countries while other countries have suggested the need for more flexibility.[17] In December,

12. WTO, *WTO News: Ambition achieved as ministers seal Cambodia membership deal*, *supra* note 11.

13. *Russian Meat Curbs Embroil WTO Accession While Technical Issues Make Slow Progress*, 20 Int'l Trade Rep. (BNA) No. 6 at 271 (Feb. 6, 2003); *Latest WTO Russia Accession Talks Conclude with Few Signs of Progress*, 20 Int'l Trade Rep. (BNA) No. 11 at 465 (Mar. 13, 2003); *Russian Official Admits WTO Accession Unlikely This Year, Despite Earlier Optimism*, 20 Int'l Trade Rep. (BNA) No. 16 at 673 (Apr. 17, 2003).

14. *Latest Russian WTO Accession Talks End with Few Signs of Progress on Key Issues*, Int'l Trade Rep. (BNA) No. 44 at 1832 (Nov. 6, 2003).

15. *Id.*

16. *OECD Steel Producer Talks Continue; Negotiators Asked to Speed Up Pace*, Int'l Trade Rep. (BNA) No. 41 at 1688 (Oct. 16, 2003).

17. *Id.*

negotiators also began discussions on enforcement and dispute settlement, focusing primarily on proposals by the EC and Canada.[18] A conference of trade ministers has been envisioned for 2004 to resolve the outstanding issues and to secure the political guidance necessary to conclude the negotiations by the end of 2004.[19] A drafting group has been established with a select group of countries to focus on drafting the text for key provisions of the steel subsidies agreement,[20] and a draft text of the agreement is expected to be finalized by early April 2004.[21]

B. U.S. Bilateral and Regional Negotiations

1. *FTAA*

The United States continued to vigorously pursue negotiations with thirty-four countries in the Western Hemisphere on an ambitious FTAA. When completed, the FTAA is expected to encompass nearly 800 million people with an output of $13 trillion. The United States and Brazil have been co-chairing the last stage of the negotiations, which are scheduled to conclude before January 2005.[22]

Preliminary market access offers were due by February 15, 2003, and countries were expected to respond to each other's initial offers over the following months in preparation for the November ministerial meeting in Miami.[23] In June, however, it became doubtful that the negotiations could be completed by the end of 2004.[24] In an attempt to conclude the talks as scheduled, options were explored on how to accommodate countries' varying levels of ambition on the substance of the agreement to ensure a conclusion on schedule. In particular, the United States and Brazil had a prolonged dispute over what should and should not be included in the FTAA.[25]

Despite some breakthroughs, the divide remained between those countries aiming for a comprehensive FTAA, including the United States, and those pursuing a more limited approach, led by Brazil. To avoid a possible collapse of the negotiations, the Miami Ministerial Declaration, endorsed by trade ministers on November 20, 2003, provides a compromise framework for the negotiations. Under that framework, countries will negotiate on a set of common obligations for inclusion in the FTAA and will leave more controversial obligations to be addressed in separate plurilateral agreements.[26] The Declaration calls on

18. *OECD Steel Talks Focus on Enforcement, Dispute Settlement*, Inside U.S. Trade (Dec. 12, 2003), *at* http://www.insidetrade.com.

19. *OECD Officials Raises Possibility of Some Country Abandoning Steel Talks*, Inside U.S. Trade (Oct. 23, 2003), *at* http://www.insidetrade.com.

20. *OECD Steel Negotiations Set to Move into New Drafting Phase*, Inside U.S. Trade (Dec. 5, 2003), *at* http://www.insidetrade.com.

21. *Draft Text on Steel Subsidies Anticipated in April, OECD Official Says*, 20 Int'l Trade Rep. (BNA) No. 42 at 1734 (Oct. 23, 2003).

22. *U.S. Announces Broad Market Access Offer, Including Textiles, in FTAA Hemispheric Talks*, 20 Int'l Trade Rep. (BNA) No. 7, at 294 (Feb. 13, 2003).

23. *Id.*

24. *U.S., Brazilian Divisions Emerge over Agenda for FTAA Mini-Ministerial*, Inside U.S. Trade (June 6, 2003), *at* http://www.insidetrade.com.

25. *U.S. Seeks Mini-Ministerial Before Miami to Discuss FTAA Scope*, Inside U.S. Trade (Oct. 31, 2003), *at* http://www.insidetrade.com; *Brazil Rejects New U.S. Proposal on Scope of FTAA Negotiations*, Inside U.S. Trade (Nov. 14, 2003), *at* http://www.insidetrade.com.

26. *Industry Reports Pressure from USTR to Back New FTAA Structure*, Inside U.S. Trade (Nov. 28, 2003), *at* http://www.insidetrade.com.

the FTAA's Trade Negotiations Committee (TNC) to establish the procedure for negotiating the set of common obligations and the plurilateral agreements. These are to be submited to negotiating groups by the end of the TNC's next meeting scheduled for February 2004.[27]

2. *Central America FTA*

The United States began negotiations with five Central American countries—Costa Rica, Guatemala, Honduras, Nicaragua, and El Salvador—on a Central American FTA (CAFTA) on January 8, 2003.[28] The parties scheduled nine rounds of negotiations, with the goal of reaching an agreement by the year's end.[29]

Five negotiating groups were set up to address the areas of market access, investment and services, government procurement and intellectual property, labor and environment, and dispute settlement and other institutional issues.[30] The goal to finish the negotiations within a year was considered ambitious, but the United States was expected to use the bilateral FTA between the United States and Chile as a "benchmark" from which to work.[31] Controversial issues for the negotiations included market access for agricultural goods and textiles and apparel.[32]

On December 17, 2003, the United States announced that it had reached agreement with all of the CAFTA countries except Costa Rica.[33] Reportedly, the agreement would allow more than 80 percent of U.S. consumer and industrial products into Guatemala, Nicaragua, El Salvador, and Honduras duty-free as soon as it went into effect. That figure would rise to 85 percent within five years and 100 percent in a decade. U.S. agricultural products would take considerably longer to reach duty-free status, however, largely because of the United States' desire to protect the U.S. sugar industry from Central American imports.[34] Under the agreement, sugar and white corn are permanently protected from ever reaching duty-free and quota-free market access.[35] On January 25, 2004, the United States and Costa Rica reached an agreement that would bring Costa Rica into the CAFTA on terms similar to those reached with the other four CAFTA countries.[36]

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27. *Id.*

28. USTR Press Release, *United States and Central American Nations Launch Free Trade Negotiations, available at* http://www.ustr.gov/new/fta/cafta/htm (last visited Jan. 24, 2004); *U.S., Five Central American Nations Kick Off FTA Talks, Aim to Conclude by End of Year*, 20 Int'l Trade Rep. (BNA) No. 3 at 113 (Jan. 16, 2003). The United States will begin negotiations with the Dominican Republic in early 2004 and will seek to bring that country into the CAFTA prior to congressional action on legislation to approve and implement the agreement. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Nicaragua Seeks Protections for Some Industries in CAFTA*, INSIDE U.S. TRADE (April 18, 2003), *at* http://www.insidetrade.com.

33. *U.S. Announces CAFTA Deal with Four Central American Countries*, 20 Int'l Trade Rep. (BNA) No. 50 at 2069 (Dec. 18, 2003).

34. Jonathan Weisman, *Accord Reached on Free Trade, Hill Fight Likely Over U.S. Pact with Central Americans*, WASH. POST, Dec. 18, 2003, at A01.

35. *CAFTA Shields Key Agricultural Commodities from Tariff Elimination*, INSIDE U.S. TRADE, p. 3 (Dec. 19, 2003), *at* http://www.insidetrade.com.

36. *U.S., Costa Rica Strike Deal in FTA Negotiations*, INSIDE U.S. TRADE (Jan. 25, 2004), *at* http://www.insidetrade.com.

The CAFTA leaves unresolved a range of key issues, such as details of service commitments in several sectors, critical textile provisions, rules on appealing investment decisions, and the structure of a citizen-based petition process for environmental problems.[37] In addition, there have been indications that the Bush Administration and House Republican leaders will face a difficult task in securing votes on the completed CAFTA from members representing districts that would be adversely impacted by greater market access for textiles.[38]

3. *Australia FTA*

The negotiations between the United States and Australia began in March 2003. The parties set an end-of-year deadline for completion, which was reaffirmed by President Bush and Australia's Prime Minister John Howard in October.[39] By mid-December, however, work on sensitive issues still remained, and the two sides were unable to complete the talks by the year's end.[40]

Agricultural issues posed the greatest difficulty for U.S. and Australian negotiators, with farm groups from both countries seeking major changes in the other's agricultural policies.[41] In addition to agriculture, the negotiators had difficulty reaching agreement on a variety of intellectual property rights and investment issues, including: (1) Australia's Foreign Investment Review Board, which screens and has the authority to block foreign direct investment in the country;[42] (2) Australia's Pharmaceutical Benefits Scheme, which makes certain prescription drugs available to Australians at subsidized prices; and (3) Australia's cultural content rules, which set aside specific amounts of television programming for Australian programs.[43]

On February 8, 2004, the United States and Australia announced that they had finally reached agreement on an FTA.[44] According to the Office of the U. S. Trade Representative, more than 99 percent of U.S. exports of manufactured goods to Australia will become duty-free immediately upon entry into force of the agreement.[45] On the other hand, the FTA would reportedly exclude new market access for sugar and, to a large extent, would shelter U.S. beef and dairy producers from Australian competition. The United States agreed to increase market access for Australian dairy and beef over time, but would not agree to phase out its above quota duties on dairy. The agreement does not include measures that would affect the pricing of drugs sold through Australia's Pharmaceutical Benefits Scheme. The

37. *Major CAFTA Issues Unresolved As U.S., Others Announce Conclusion*, INSIDE U.S. TRADE (Dec. 19, 2003), *at* http://www.insidetrade.com.

38. *Administration Faces Tough Fight for Textile Republican Votes on CAFTA*, INSIDE U.S. TRADE, p. 1 (Jan. 2, 2004), *at* http://www.insidetrade.com.

39. *U.S.-Australia Free Trade Talks to Continue Into January 2004*, 20 Int'l Trade Rep. (BNA) No. 49 at 2032 (Dec. 11, 2003).

40. *Id.*

41. *U.S.-Australia Trade Talks to Face Tough Challenges in Agriculture, Services*, 20 Int'l Trade Rep. (BNA) No. 3 at 134 (Jan. 16, 2003).

42. *Zoellick, Vaile to Meet as Some Suggest FTA Talks Could Be Extended*, INSIDE U.S. TRADE, p.6 (Nov. 21, 2003), *at* http://www.insidetrade.com.

43. *Significant Disagreements Remain as U.S. Australian Free Trade Talks Enter Fifth Round*, 20 Int'l Trade Rep. (BNA) No. 48 at 1992 (Dec. 4, 2003).

44. Press Release, Office of the U.S. Trade Representative, U.S. and Australia Complete Free Trade Agreement, *available at* http://www.ustr.gov/releases/2004/02/04-08.pdf (last visited February 24, 2004).

45. *Id.*

agreement will also allow Australia to continue to impose local-content requirements on new and emerging media, such as digital and interactive television. The U.S. industry agreed to allow current restrictions imposed by Australia, but objected to allowing such restrictions to be extended to new media. The parties are expected to release the text of the agreement by the end of February 2004.[46]

4. *Morocco FTA*

The United States and Morocco launched negotiations in January 2003 with the aim of completing discussions by the year's end. The parties established eleven separate negotiating groups to address textiles, market access, labor, the environment, intellectual property protection, government procurement, services, investment, legal issues, customs, and agriculture.[47] The United States offered negotiating proposals before the second round of negotiations, which Morocco has been using as the basis for subsequent negotiations.[48]

Any trade agreement between the parties would likely eliminate Morocco's 20 percent average tariff imposed on U.S. products, as well as the 4 percent average tariff that the United States applies to Moroccan imports. Aside from tariff elimination, the United States is looking to increase intellectual property protection and reduce barriers to U.S. investment in Morocco.[49] Agriculture has been the most controversial topic in the negotiations, with Morocco seeking a transition period of twelve to fifteen years to eliminate its tariffs on agricultural imports. Although this and other outstanding issues caused the parties to miss their year-end deadline, they plan to continue their negotiations in 2004.[50]

5. *Southern African Customs Union FTA*

The United States and the five Southern African Customs Union (SACU) nations—Botswana, Lesotho, Namibia, South Africa, and Swaziland—commenced negotiations in June 2003. Seven working groups have been set up to handle different aspects of the negotiations, including market access for agricultural and non-agricultural products, technical barriers to trade, customs procedures, labor rights, environmental protection, sanitary and phytosanitary (SPS) measures, investment, intellectual property rights, services, electronic commerce, and dispute settlement.[51] The five SACU countries comprise the largest U.S. export market in sub-Saharan Africa, with $2.5 billion in U.S. exports in 2002. This FTA will be the first U.S. FTA in sub-Saharan Africa, and the first time the SACU nations have jointly negotiated an agreement of this type.[52]

The SACU countries and the United States held two rounds of negotiations in June and August 2003.[53] The negotiations primarily dealt with non-controversial issues such as mar-

46. *U.S., Australia Reach Deal that Excludes Sugar; Offers Some Beef, Dairy Openings*, INSIDE U.S. TRADE (Feb. 8, 2004), *at* http://www.insidetrade.com.

47. *U.S., Morocco Launch FTA Talks, Aim for 2003 Completion*, INSIDE U.S. TRADE (Jan. 24, 2003), *at* http://www.insidetrade.com.

48. *U.S.-Morocco Negotiations to Be Based Solely on U.S. Proposals*, INSIDE U.S. TRADE (Feb. 28, 2003), *at* http://www.insidetrade.com.

49. *U.S., Morocco Launch FTA Talks, Aim for 2003 Completion, supra* note 47.

50. Gary G. Yerkey, *U.S. and Morocco Fail in Bid to Conclude Free Trade Negotiations by End of This Year*, 20 Int'l Trade Rep. (BNA) No. 49 at 2046 (Dec. 11, 2003).

51. *U.S., SACU Countries Likely to Miss Next Year's Deadline for Finishing FTA Talks*, 20 Int'l Trade Rep. (BNA) No. 50 at 2078 (Dec. 18, 2003).

52. Fact Sheet, Office of the U.S. Trade Representative, Free Trade With Southern Africa, Building on the Success of AGOA, *available at* http://www.ustr.gov/new/fta/sacu.htm.

53. *See id.*

ket access, rules of origin, and SPS measures. The third round of negotiations, originally scheduled for mid-October, was rescheduled for February 2004. In these and the other talks to be held in 2004, negotiators will tackle in detail more difficult issues for the parties, such as services, investment, government procurement, and intellectual property rights. Although U.S. trade officials still hope to complete the agreement by the end of 2004, that deadline is likely to be missed.[54]

6. *New Negotiations*

The Bush Administration has notified Congress of its intent to begin FTA negotiations with the Dominican Republic, Panama, the four countries covered by the Andean Trade Preferences Act, and Bahrain in 2004. Additionally, the Administration announced that it would pursue an FTA with Thailand, although it has not yet formally notified Congress. Other countries, including New Zealand, Sri Lanka, Egypt, and Taiwan have pushed for FTA negotiations with the United States, but the United States has not signaled whether or when it might move toward FTA talks with those countries.[55]

III. WTO Dispute Settlement Activity

By far the biggest story in WTO dispute settlement in 2003 was the appeal of the steel safeguard measure imposed by the United States in March 2002. Debate focused on the decisions issued by the WTO Panel and the Appellate Body faulting the safeguard measure and the controversial threats of immediate retaliation made against the United States by the EC, Japan, and the other complaining parties in that case.

Issues regarding implementation of adverse WTO decisions and retaliation against the United States by the EC and other countries also were the subject of great debate in other disputes, most notably in the disputes over the tax treatment for foreign sales corporations, the Anti-Dumping Act of 1916, and the Continued Dumping and Subsidy Offset Act of 2000. Moreover, decisions issued by WTO Panels and the Appellate Body continued to be harshly criticized by the United States for violating the appropriate standard of review and creating obligations not provided for in the applicable agreements.

A. Dispute Settlement Reports

1. *Reports Addressing the Agreement on Safeguards*

a. United States—Definitive Safeguard Measures on Imports of Certain Steel Products

In this case, eight complainants—the EC, Brazil, China, Japan, New Zealand, Norway, South Korea, and Switzerland—challenged the steel safeguard measure imposed by the United States in March 2002 pursuant to section 201 of the Trade Act of 1974. In a report exceeding 900 pages, the WTO Panel found the safeguard measure to be inconsistent with the WTO Agreement on Safeguards and article XIX of the General Agreement on Tariffs and Trade 1994 (GATT 1994) on four grounds. First, the Panel found that the

54. *Supra* note 51, at 2078.

55. *COG Meets on FTA partners as Eyebrows Rise over Sri Lanka*, Inside U.S. Trade (Nov. 7, 2003), *at* http://www.insidetrade.com; *Egypt Pushes for FTA, U.S. Holds Out for Further Internal Reform*, Inside U.S. Trade (Feb. 14, 2003), *at* http://www.insidetrade.com; *New Zealand Trade Minister Sutton Presses Congress for Free Trade Deal*, 20 Int'l Trade Rep. (BNA) No. 6 at 277 (Feb. 6, 2003).

U.S. International Trade Commission (ITC) failed to provide "a reasoned and adequate explanation demonstrating that 'unforeseen developments' had resulted in increased imports causing serious injury to the relevant domestic producers."[56] Second, the Panel found that the ITC failed to explain adequately how the facts supported its determination that the safeguard measure was in response to a recent and sudden increase in imports with respect to some of the targeted products.[57] Third, the Panel determined that the ITC failed to provide an adequate explanation for its determination of a causal link between increased imports and serious injury to the domestic industry with respect to all but one of the targeted products.[58] Finally, the Panel found that the ITC violated the requirement of "parallelism" under articles 2.1 and 4.2 of the Safeguards Agreement by including imports from the United States' free trade partners in its investigation, while excluding their products from the final safeguard measure.[59]

After the United States appealed, the Appellate Body upheld most of the Panel's findings. Specifically, the Appellate Body affirmed the Panel's findings that the ITC failed to provide satisfactory explanations of how the steel safeguard measure was in response to a recent and sudden increase in imports for three of the targeted products and how the safeguard measure was in response to "unforeseen developments." The Appellate Body also agreed that the ITC violated the "parallelism" requirement of articles 2.1 and 4.2 of the Safeguards Agreement.[60] The Appellate Body did, however, reverse the Panel's findings that the ITC had failed to explain adequately its conclusion that imports increased for two of the targeted products—tin mill products and stainless steel wire—and that a causal link existed between increased imports of those products and serious injury that threatened the domestic industry. Nevertheless, the Appellate Body determined that it was unnecessary to analyze whether its reversal had an impact on the Panel's conclusions, because it had already upheld the Panel's findings on "unforeseen developments" and "parallelism."[61] Accordingly, the Appellate Body found the steel safeguard measure to be inconsistent with the Safeguards Agreement and article XIX of the GATT 1994 with respect to all of the targeted products.

Throughout the WTO dispute settlement process, certain complaining parties—particularly the EC—threatened to retaliate against the United States immediately after adoption of an adverse Panel or Appellate Body decision regarding the steel safeguard measure. The complaining parties based their threats on a controversial, untested theory of article 8 of the Safeguards Agreement.[62] By the EC's own admission, the threats were intended to

56. WTO Panel, *United States—Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/R, WT/DS249/R, WT/DS251/R, WT/DS252/R, WT/DS253/R, WT/DS254/R, WT/DS258/R, WT/DS259/R at 11.2 (July 11, 2003).

57. *Id.*

58. *Id.*

59. *Id.*

60. WTO Appellate Body, *United States—Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R at 513(a),(b),(e) (Nov. 10, 2003).

61. *See id.* para. 513(c) and (d).

62. *See Trade Experts Clash Over Validity of EU Steel 201 Retaliation Threat*, INSIDE U.S. TRADE (Oct. 3, 2003), *at* http://www.insidetrade.com; *WTO Sets Dispute Panel to Review Bush Implementation of Steel Tariffs*, WTO REPORTER (June 4, 2002).

influence the exclusions granted by the United States and ultimately, to force the Bush Administration to lift the relief.[63]

The threats achieved their intended effect. On December 4, 2003, President Bush issued a proclamation lifting the steel safeguard tariffs more than fifteen months before they were scheduled to expire in March 2005.[64] Although widely perceived as an attempt to avoid the threatened retaliation, the Bush Administration asserted that the termination of the tariffs was based on the ITC's mid-term review of the safeguard remedy.[65] In response to the termination of the tariffs, the EC and the other complaining parties rescinded or cancelled the retaliatory measures that would have been imposed against the United States.[66]

b. Argentina—Definitive Safeguard Measure on Imports of Preserved Peaches

In this case, Chile claimed a safeguard measure imposed by Argentina on imports of preserved peaches violated article XIX:1(a) of the GATT 1994 and several provisions of the Safeguards Agreement.[67] The WTO Panel largely agreed with Chile's complaint and struck down the safeguard measure. Specifically, the Panel found that Argentina acted inconsistently with its obligations under article XIX:1(a) of the GATT 1994 by failing to demonstrate that its action was justified by the existence of "unforeseen circumstances."[68] The Panel also faulted Argentina for failing to determine whether there was an increase in imports of preserved peaches, in either absolute terms or relative to domestic production, as required by article XIX:1(a) of the GATT 1994 and articles 2.1, 4.1(b), and 4.2(a) of the Safeguards Agreement.[69] Furthermore, the Panel ruled that Argentina violated article XIX:1(a) of the GATT 1994 and articles 2.1, 4.1(b), and 4.2(a) of the Safeguards Agreement in finding the existence of a threat of serious injury because it did not: (1) evaluate all of the relevant factors having a bearing on the domestic industry's situation; (2) provide a reasoned explanation of how the facts supported its finding; and (3) find that serious injury was clearly imminent.[70] There was no appeal of the Panel's report, and the report was adopted by the WTO Dispute Settlement Body (DSB) on April 15, 2003.[71]

2. *Reports Addressing the AD and SCM Agreements*

a. United States—Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products From Japan

Japan asserted a number of claims in this case challenging U.S. sunset review laws, policies, and procedures, both on their face and as applied under the Anti-Dumping Agreement (AD Agreement). The WTO Panel, however, rejected each and every one of Japan's claims

63. *See, e.g., EU Welcomes Bush Pledge to Act Soon On Steel Tariffs but Also Threatens Sanctions*, WTO REPORTER (Nov. 17, 2003); *EU Agrees to Hold Fire on Steel Sanctions Against U.S. Until Sept. 30 Due to Exclusions*, WTO REPORTER (July 22, 2002).

64. *See* Proclamation No. 7741, 68 Fed. Reg. 68483 (Dec. 8, 2003).

65. *See id.; Bush Ends Steel Safeguard Tariffs In Face of Threat by EU to Retaliate*, WTO REPORTER (Dec. 5, 2003).

66. *See, e.g.*, Council Regulation 2168/2003, OJ L 326 (Dec. 13, 2003); *EU's Lamy Says Commission Will Cancel $2.2 Billion in Steel Sanctions*, WTO REPORTER (Dec. 5, 2003).

67. *See* WTO Panel, *Argentina—Definitive Safeguard Measure on Imports of Preserved Peaches*, WT/DS238/R (Feb. 14, 2003).

68. *Id.* paras. 7.35, 8.1(a).

69. *Id.* paras. 7.82, 8.1(b).

70. *Id.* paras. 7.133, 8.1(c).

71. WTO Dispute Settlement Body, *Argentina—Definitive Safeguard Measure on Imports of Preserved Peaches*, WT/DS238/5 (Apr. 29, 2003).

upholding the determinations made by the U.S. Department of Commerce (Commerce) and the ITC in their entirety. Among other things, the Panel upheld: (1) the U.S. statute providing for the automatic initiation of sunset reviews, both on its face and as applied by Commerce; (2) the standard applied by Commerce for what constitutes a *de minimis* margin of dumping in a sunset review; (3) Commerce's *Sunset Review Policy Bulletin* and its provisions regarding the determination of the likelihood of continuation or recurrence of dumping in sunset reviews; (4) Commerce's determination of the likelihood of continuation or recurrence of dumping on an order-wide, rather than a company-specific, basis; (5) Commerce's evaluation of the evidence in determining that dumping was likely to continue if the antidumping order was revoked; and (6) the ITC's cumulation of imports from Japan with those of the other countries subject to the sunset review in determining that revocation of the order would likely lead to continuation or recurrence of injury.[72]

Japan appealed certain of the Panel's findings relating to Commerce's determination to the Appellate Body.[73] In a decision issued on December 15, 2003, the Appellate Body largely upheld these findings. The Appellate Body did overturn the Panel's finding that Commerce's *Sunset Review Policy Bulletin* is not a legal instrument that is subject to challenge on its face.[74] The Appellate Body, however, then proceeded to uphold the specific provisions of the *Policy Bulletin* that were challenged by Japan, both on their face and as applied by Commerce in the sunset review at issue.[75]

b. United States—Final Countervailing Duty Determination With Respect to Certain Softwood Lumber From Canada

The Panel in this case issued a mixed ruling, rejecting some of Canada's claims against Commerce's final countervailing duty determination while upholding others. Specifically, the Panel found that Commerce's determination that the Canadian provincial stumpage programs constituted a "financial contribution by a government" in the form of the provision of a good or service was not inconsistent with article 1.1(a)(1)(iii) of the Agreement on Subsidies and Countervailing Measures (SCM Agreement).[76] At the same time, the Panel sided with Canada in finding that Commerce violated articles 14 and 14(d) of the SCM Agreement by using cross-border comparisons of stumpage prices in the U.S. and Canadian markets in determining that the Canadian provincial governments were providing timber to lumber producers at unfairly low prices.[77] The Panel also found that Commerce erred in presuming, rather than establishing through a pass-through analysis, that downstream producers of log and lumber inputs were subsidized through transactions with upstream enterprises benefiting from the stumpage program in violation of article 10 of the SCM Agreement and article VI:3 of the GATT 1994.[78]

72. WTO Panel, *United States—Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products From Japan*, WT/DS244/R para. 8.1 (Aug. 14, 2003).

73. *See* Notice of Appeal, *United States—Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products From Japan*, WT/DS244/7 (Sept. 17, 2003).

74. WTO Appellate Body, *United States—Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products From Japan*, WT/DS244/AB/R para. 212(a) (Dec. 15, 2003).

75. *See id.* paras. 175, 190, 205–207, 212(c), 212(d).

76. WTO Panel, *United States—Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/R (Aug. 29, 2003), para. 8.1(a).

77. *See id.* paras. 7.48, 7.63–7.65, 8.1(b).

78. *Id.* paras. 7.97–7.99, 8.1(c).

On appeal, the Appellate Body likewise issued a mixed ruling. The Appellate Body affirmed the Panel's finding upholding Commerce's determination on the financial contribution issue.[79] However, it reversed the Panel's finding against Commerce's use of cross-border comparisons of stumpage prices in determining whether a benefit was conferred, finding instead that under certain conditions an investigating authority may use a benchmark other than private prices in the country of provision.[80] Moreover, while the Appellate Body affirmed the Panel's finding that Commerce erred by failing to conduct a pass-through analysis in determining whether downstream producers of *logs* were subsidized through transactions with upstream enterprises benefiting from the stumpage program, it reversed that finding with respect to downstream producers of *lumber*.[81]

c. Argentina—Definitive Anti-Dumping Duties on Poultry From Brazil

The Panel in this case found that Argentina's decision to impose antidumping duties on Brazilian poultry imports violated the AD Agreement in fourteen different respects. As some of the most egregious violations, the Panel found that Argentina violated articles 5.3 and 5.8 of the AD Agreement in determining that there was sufficient evidence of dumping and injury even to initiate an investigation.[82] The Panel also found that Argentina acted inconsistently with its obligations under article 6.8 and Annex II of the AD Agreement with respect to its use of facts available in disregarding the export price data submitted by certain exporters.[83] Furthermore, the Panel determined that Argentina violated article 3 of the AD Agreement by including non-dumped imports in its injury analysis and by failing to evaluate all of the relevant economic factors and indices set forth in article 3.4.[84] Based on the fundamental and pervasive nature of the violations, the Panel took the unusual step of actually recommending that Argentina revoke its antidumping measure on Brazilian poultry.[85] The Panel's decision was not appealed and was adopted by the DSB on May 19, 2003.[86]

3. *Reports Addressing Other Disputes*

a. European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries

In this case, India challenged the additional tariff preferences given to certain developing countries under the EC's Generalized System of Preferences (GSP) based on steps they had taken to fight the trafficking and production of illegal drugs. India contended that such additional tariff preferences unfairly discriminated between developing countries in violation of the WTO's most-favored-nation principle found in article I:1 of the GATT 1994. The WTO Panel agreed.[87] The Panel also rejected the EC's claim that the special tariff

79. WTO Appellate Body, *United States—Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R para.167(a) (Jan. 19, 2004).

80. *See id.* paras. 167(b), (c), (d).

81. *See id.* paras. 167(e), (f).

82. WTO Panel, *Argentina—Definitive Anti-Dumping Duties on Poultry From Brazil*, WT/DS241/R paras. 8.1(a)(i)(ii) (Apr. 22, 2003).

83. *Id.* para. 8.1(a)(vi).

84. *See id.* paras. 8.1(a)(vii)–(x), (xiii)–(xiv).

85. *Id.* para. 8.7.

86. WTO Dispute Settlement Body, *Argentina—Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/6 (May 22, 2003).

87. WTO Panel, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/R paras. 7.58–7.60, 8.1(b) (Dec. 1, 2003).

preferences satisfied the GATT's so-called "enabling clause," which requires WTO Members to provide "nonreciprocal and nondiscriminatory preferences" to developing countries under their GSP schemes.[88] But in an unusual dissenting opinion, one of the three members of the Panel found that India's complaint should have been dismissed on procedural grounds. According to the dissent, India should have based its claim on the enabling clause, and not on article I:1 of the GATT 1994.[89] If upheld, the Panel's decision may have troubling implications for other WTO Members, including the United States, who provide additional tariff preferences under their GSP schemes for developing countries that satisfy certain criteria. The EC has appealed the Panel's report.[90]

b. Japan—Measures Affecting the Importation of Apples

This dispute centered on quarantine restrictions imposed by Japan to prevent the introduction of fire blight, a bacterial disease of apples and pears. The Panel upheld the United States' challenge, finding that Japan's restrictions violated article 2.2 of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) because they were maintained without sufficient scientific evidence.[91] The Panel also found that the Japanese restrictions did not comply with article 5.7 of the SPS Agreement, which requires that a provisional measure be imposed only if scientific evidence is insufficient to determine whether a danger exists.[92] Furthermore, the panel determined that the Japanese restrictions were not based on a proper risk assessment as required by article 5.1 of the SPS Agreement.[93] Although Japan appealed the Panel's decision, the Appellate Body upheld the Panel's decision on all grounds.[94] The Panel and Appellate Body reports were adopted by the DSB on December 10, 2003.[95]

B. Implementation

1. *Completed Implementation*

The United States completed implementation of two adverse WTO decisions this year. First, Commerce issued a determination to comply with the Panel's decision in *United States—Anti-Dumping and Countervailing Measures on Steel Plate From India*. In its decision, the Panel found that Commerce had acted inconsistently with article 6.8 and Annex II of the AD Agreement in rejecting the U.S. sales data reported by the Indian respondent and in applying facts available, because it failed to provide a "legally sufficient justification" as to why the reported data could not be used "without undue difficulties."[96] In implementing

88. *Id.* paras. 7.176–7.177, 8.1(d).

89. *See id.* para. 9.21.

90. WTO Dispute Settlement Body, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/7 (Jan. 8, 2004).

91. WTO Panel, *Japan—Measures Affecting the Importation of Apples*, WT/DS245/R para 9.1(a) (July 15, 2003).

92. *Id.* para. 9.1(b).

93. *Id.* para. 9.1(c).

94. *See* WTO Appellate Body, *Japan—Measures Affecting the Importation of Apples*, WT/DS245/AB/R para. 243 (Nov. 26, 2003).

95. WTO Dispute Settlement Body, *Japan—Measures Affecting the Importation of Apples*, WT/DS245/8 (Dec. 16, 2003).

96. WTO Panel, United States—Anti-Dumping and Countervailing Measures on Steel Plate from India, WT/DS206/R paras. 7.67–70, 7.75, 8.1 (June 21, 2002).

the Panel's findings, Commerce first provided a more detailed explanation for why it rejected the reported U.S. sales data and why it was continuing to apply facts available. However, it then went on to recalculate the respondent's dumping margin using a different basis for the U.S. sales price than had been used originally. The result was a dumping margin of 42.39 percent.[97]

Second, Commerce implemented the Panel and Appellate Body decisions in *United States—Countervailing Measures Concerning Certain Products From the European Communities*. In that case, the Panel and Appellate Body found that the privatization methodology used by Commerce in imposing or maintaining twelve countervailing duty orders on imports of steel products from the EC violated various provisions of the SCM Agreement. In particular, the Panel and Appellate Body faulted the so-called "same person" methodology used by Commerce because it failed to assess whether a countervailable benefit continued to exist for formerly government-owned companies after a privatization or change in ownership.[98]

To implement the Panel and Appellate Body decisions, Commerce published a new methodology to address the countervailability of subsidies after a privatization or change in ownership. The new methodology starts with a "baseline presumption that non-recurring subsidies can benefit [a] recipient over a period of time normally corresponding to the average useful life of the recipient's assets."[99] This baseline presumption may be rebutted, however, "by demonstrating that, during the allocation period, a privatization occurred in which the government sold its ownership of all or substantially all of [the recipient] company or its assets . . . and that the sale was an arm's-length transaction for fair market value."[100] After publishing its new methodology, Commerce proceeded to implement that methodology in the twelve cases that had been challenged by the EC before the WTO.[101]

2. *Pending Implementation*

The United States has been subject to intense criticism, pressure, and threats of retaliation from certain trading partners this year, particularly the EC, over its failure to implement several WTO decisions faulting U.S. laws. Nowhere have the criticisms, pressure, and threats to retaliate been more evident than in the EC's efforts to seek the repeal of the Foreign Sales Corporation tax law (FSC) and its replacement, the Extraterritorial Income Exclusion Act (ETI), which were struck down by the WTO in *United States—Tax Treatment for "Foreign Sales Corporations."*[102] Under the threat of retaliation from the EC, the Senate

97. *Antidumping Measure on Certain Cut-to-Length Carbon-Quality Steel Plate Products From India*, 68 Fed. Reg. 7967–69 (Dep't Commerce Feb. 19, 2003) (notice of determination under Section 129 of the Uruguay Round Agreements Act).

98. *See United States—Countervailing Measures Concerning Certain Products From the European Communities*, WT/DS212/AB/R paras. 150–152, 161(a) (Dec. 9, 2002).

99. *See Notice of Final Modification of Agency Practice Under Section 123 of the Uruguay Round Agreements Act*, 68 Fed. Reg. 37125, (Dep't Commerce June 23, 2003) (modification of agency practice regarding privatizations).

100. *Id.* at 37127.

101. *Countervailing Measures Concerning Steel Products From the European Communities*, 68 Fed. Reg. 64858 (Dep't Commerce Nov. 17, 2003) (notice of implementation under Section 129 of the Uruguay Round Agreements Act).

102. *See* WTO Appellate Body, *United States—Tax Treatment for "Foreign Sales Corporations,"* WT/DS108/AB/R (Feb. 24, 2000); WTO Appellate Body, *United States—Tax Treatment for "Foreign Sales Corporations,"* WT/DS108/AB/RW (Jan. 14, 2002).

Finance Committee approved a bill to repeal and replace FSC/ETI on October 1, 2003; the House Ways and Means Committee followed suit on October 28, 2003.[103] However, the bills were not considered or voted on by the full Senate and House before the end of the legislative session in November. The EC announced that on March 1, 2004, it will begin phasing in the $4 billion in annual retaliation approved by the WTO if the United States has not repealed FSC/ETI.[104]

The EC has also sought to retaliate against the United States for its failure to implement the ruling in *United States—Anti-Dumping Act of 1916*. Although three bills were introduced before the U.S. Congress to repeal the Anti-Dumping Act of 1916 (1916 Act), none of the three has been voted out of committee.[105] In September 2003, the EC renewed its request for authorization to retaliate against the United States. However, the United States has challenged the retaliation sought by the EC in an arbitration proceeding under article 22.6 of the Dispute Settlement Understanding (DSU).[106] The United States has challenged the EC's ability to show any adverse trade effects from the 1916 Act and has specifically targeted the EC's method of retaliation. The EC has sought to impose triple duties against all U.S. products subject to antidumping orders. A decision from the arbitration panel is expected in January 2004.[107]

In yet another major area of dispute between the United States and its trading partners, the United States was given until December 27, 2003, to implement the adverse Panel and Appellate Body decisions in *United States—Continued Dumping and Subsidy Offset Act of 2000*.[108] President Bush proposed repealing the Continued Dumping and Subsidy Offset Act of 2000 (the so-called "Byrd Amendment") in his budget proposal for fiscal year 2004. Shortly thereafter, however, nearly seventy U.S. Senators sent a letter to the President rejecting this effort.[109] Although the United States sought an extension of the December 27, 2003, deadline for implementation, eight of the complaining parties—led by the EC—refused. On January 15, 2004, these complaining parties submitted requests for authorization to retaliate against the United States. A stumbling block for these parties has been and will continue to be proving what, if any, adverse trade effects they are suffering as a result of the Byrd Amendment.[110]

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103. *See Finance Approves 19–2 Export Tax Bill With More Manufacturing, Subpart F Relief*, WTO REPORTER, Oct. 2, 2003; *Ways and Means Approves ETI Repeal Bill With No Breaks for Overseas Construction*, WTO REPORTER, Oct. 29, 2003.

104. *EU Sets March 1 Deadline for ETI Repeal, Details Plan to Phase in Sanctions Otherwise*, WTO REPORTER, Nov. 6, 2003.

105. *E.g.* S. 1080, 108th Cong. (2003); S. 1155, 108th Cong. (2003); H.R. 1073, 108th Cong. (2003).

106. *See* Communication from the Arbitrators, *United States—Anti-Dumping Act of 1916*, WT/DS136/19 (Sept. 29, 2003); Request by the United States for Arbitration Under Article 22.6 of the DSU, *United States—Anti-Dumping Act of 1916*, WT/DS136/16 (Jan. 18, 2002).

107. *See Iowa Court Hands Down First Ever Ruling in 1916 AD Act*, INSIDE U.S. TRADE (Dec. 19, 2003), *at* http://www.insidetrade.com; *EU Takes New Step Toward Retaliation Against 1916 Act*, INSIDE U.S. TRADE (Sept. 26, 2003), *at* http://www.insidetrade.com.

108. Award of the Arbitrator, *United States—Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/14 and WT/DS234/22, para. 83 (June 13, 2003).

109. *See Co-Complainants Hold Talks on Response to U.S. Non-Compliance on Byrd Amendment*, WTO REPORTER, Dec. 9, 2003; *Complainants Ponder Next Move, Retaliation in Byrd Amendment Dispute*, WTO REPORTER, Nov. 13, 2003.

110. *See Eight Nations Ask WTO Meeting to Secure Retaliation Rights Against Byrd Amendment*, WTO REPORTER, Jan. 16, 2004.

The United States continued its efforts to implement the decision striking down the "all others" rate provision of the antidumping statute in *United States—Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*.[111] In April 2003, U.S. Trade Representative Robert Zoellick and Commerce Secretary Donald Evans sent a letter to the Congress setting forth a proposed amendment to that provision. As of yet, however, no change has been made to the statute.[112] In December, Japan and the United States agreed to extend the deadline for implementation until July 31, 2004.[113]

Finally, the United States has not yet passed legislation to implement the decisions in *United States—Section 211 Omnibus Appropriations Act of 1998* (*Section 211*) and *United States—Section 110(5) of the US Copyright Act* (*Music Licensing*). With respect to the *Section 211* decision, the EC and the United States agreed to extend the compliance deadline to December 31, 2004.[114] With respect to the *Music Licensing* dispute, the United States and the EC reached a temporary settlement that called for the United States to pay $1.38 million per year for the next three years into a special fund for European musical artists, with the understanding that the United States will eventually amend the 1998 Fairness in Music Licensing Act to bring it into compliance with WTO rules.[115]

3. *Article 21.5 Challenges*

There was only one ruling issued this year in a challenge to the sufficiency of a WTO Member's implementation of an adverse WTO decision under article 21.5 of the DSU—the Appellate Body's decision in *European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen From India*.[116] The article 21.5 compliance panel had rejected all eight of the claims by India against the EC's implementation of the prior WTO decisions in that case.[117] Nevertheless, after India appealed certain of the claims rejected by the compliance panel, the Appellate Body overturned one of the panel's findings. Specifically, the Appellate Body reversed the panel's finding that the EC had correctly determined the volume of dumped imports for purposes of making an injury determination.[118] The Appellate Body determined that the EC's methodology improperly treated all imports from Indian producers that were not examined individually as dumped imports, despite the fact that two of the five producers that were examined individually were found not to be dumping. In this regard, the Appellate Body concluded that the EC's injury determination was not based on

111. *See* WTO Appellate Body, *United States—Anti-Dumping Measures on Certain Hot-Rolled Steel Products From Japan*, WT/DS184/AB/R (July 24, 2001).

112. *See U.S. Pushes Hot-Rolled Extension; Takes Quiet Approach to Hormone Ban*, INSIDE U.S. TRADE (Dec. 5, 2003), *at* http://www.insidetrade.com; *Zoellick, Evans Urge Congress to Amend Antidumping Law to Comply With WTO Ruling*, WTO REPORTER, Apr. 17, 2003.

113. *WTO DSB Gives U.S. Additional Time To Comply With Hot-Rolled Steel Ruling*, WTO REPORTER, Dec. 11, 2003.

114. Modification of the Agreement under Article 21.3(b) of the DSU, *U.S.—Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/14 (Dec. 24, 2003).

115. *U.S. Finally Moves to Pay EU Musicians In Fund Settling WTO Music Licensing Spat*, WTO REPORTER, May 14, 2003.

116. WTO Appellate Body, *European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen From India*, WT/DS141/AB/RW (Apr. 8, 2003).

117. WTO Panel, *European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen From India*, WT/DS141/RW paras. 7.1–7.2 (Nov. 29, 2002).

118. WTO Appellate Body, *European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen From India*, WT/DS141/AB/RW para. 183(b)(i) (Apr. 8, 2003).

an "objective examination" as required under aticles 3.1 and 3.2 of the AD Agreement, but was instead predetermined by the methodology itself.[119]

IV. U.S. Trade Remedy Decisions

The ITC's mid-term review of the steel safeguard measure, and its concurrent investigation of the impact of the safeguard tariffs on domestic consumers of steel, dominated trade remedy litigation in the United States in 2003. Commerce also issued significant and hotly contested antidumping and countervailing duty determinations with respect to semiconductors from Korea, catfish fillets from Vietnam, and wheat from Canada. As an indication of the increasing trade tensions with China, this year also saw several proceedings filed under the China-specific safeguard provisions for textiles and other products to which China agreed as part of its accession to the WTO. Moreover, several notable decisions were issued by the U.S. Court of International Trade (CIT), the Federal Circuit, and North American Free Trade Agreement (NAFTA) Binational Panels. In particular, three key decisions were issued by NAFTA Panels in the ongoing softwood lumber dispute between Canada and the United States.

A. Administrative Decisions

1. *Mid-Term Review and Section 332 Investigation Relating to Steel Safeguard Measure*

The ITC conducted two investigations regarding the steel safeguard tariffs imposed by President Bush in March 2002. The first investigation, which was required under section 204 of the Trade Act of 1974, studied the impact of the tariffs on the domestic steel industry and the industry's progress toward restructuring and adjusting to import competition at the mid-term point of the tariffs. The second investigation, which was requested by the House Ways and Means Committee under section 332 of the Tariff Act of 1930, was a fact-finding study of the impact of the tariffs on domestic consumers of steel, such as auto and auto parts manufacturers, tool and die makers, and machine tool manufacturers. The ITC combined its two reports from these investigations into a single document.

In its mid-term review report, the ITC found that the U.S. steel industry had undergone extensive restructuring and consolidation. It also found that U.S. steel companies and their unions had concluded "innovative new collective bargaining agreements" since the tariffs were imposed that were "designed to achieve goals such as reducing fixed costs, improving productivity, and protecting retiree welfare." Furthermore, the ITC found that the steel industry had made substantial capital investments "to upgrade existing facilities and invest in new technologies to reduce costs and improve product quality."[120]

In its report of the impact on steel-consuming industries, the ITC found that some disruptions occurred in steel availability and quality after the tariffs and that steel prices, which initially increased and then declined, remained higher than pre-tariff levels in some of the product categories.[121] However, the ITC also found that 76 percent of steel consum-

119. *See id.* paras. 132–133, 146.

120. Steel: Monitoring Developments in the Domestic Industry and Steel-Consuming Industries: Competitive Conditions With Respect to Steel Safeguard Measures, USITC Pub. No. 3632 Vol. I, at vi–vii,ix–xi, xiv, xviii (Sept. 19, 2003).

121. *See id.* at 22.

ers responding to a survey said their customers did not shift to foreign suppliers after the tariffs and that 93 percent said they did not shift U.S. production overseas. Further, while employment in steel-consuming industries fell or remained flat in the year following the tariffs, the ITC found that employment losses were greater in the year before the tariffs than in the year after.[122] The ITC estimated the overall cost of the tariffs to the U.S. economy at $30.4 million in annual GDP loss.[123]

Both supporters and opponents of the tariffs cited the ITC's findings as support for their positions. Representatives of the U.S. steel industry cited the ITC's conclusions as evidence that the tariffs benefited the industry without unduly harming steel consumers and should, therefore, be continued for their full three-year term. On the other hand, steel consumers argued that the economic data in the reports bolstered their position that the tariffs brought more harm than benefit to the overall U.S. economy.[124] Ultimately, President Bush determined that the restructuring, consolidation, and investment by the U.S. steel industry since the steel safeguard relief was imposed constituted "changed economic circumstances" that justified terminating the relief under section 204 of the Trade Act of 1974. Accordingly, the President terminated the relief on December 4, 2003.[125]

2. *Antidumping and Countervailing Duty Cases*

a. *Dynamic Random Access Memory Semiconductors from the Republic of Korea*

In the countervailing duty investigation of *Dynamic Random Access Memory Semiconductors from the Republic of Korea*, Commerce determined that memory chip maker Hynix Semiconductor had received substantial countervailable subsidies from three huge bailouts by the South Korean government. As a result, Commerce calculated a subsidy rate for Hynix of 44.29 percent.[126] In contrast, Commerce determined that another Korean memory chip maker, Samsung Electronics, only had a *de minimis* subsidy rate of 0.04 percent.[127] Following the ITC's final determination that the U.S. industry was materially injured by subsidized Korean imports of the subject merchandise, Commerce imposed countervailing duties on imports from all Korean memory chip makers other than Samsung at a rate of 44.29 percent.[128] South Korea has challenged the determinations by Commerce and the ITC at the WTO. Among other things, South Korea contends that in its countervailing duty determination, Commerce failed to demonstrate the existence of a financial contribution by the Korean government to Hynix, failed to demonstrate that the South Korean banks that participated in the bailout of Hynix did so under the direction or entrustment of the government, and failed to demonstrate that a benefit was conferred on Hynix given available market benchmarks.[129]

122. *See id.* at 23.

123. *See id.* at 24.

124. *Opponents, Proponents of Steel Tariffs Cite Supporting Evidence in ITC Reports*, 20 Int'l Trade Rep. (BNA) No. 38 at 1567 (Sept. 25, 2003).

125. *See* Presidential Proclamation 7741, *supra* note 64; *Bush Ends Steel Safeguard Tariffs In Face of Threat by EU to Retaliate*, *supra* note 65.

126. *Dynamic Random Access Memory Semiconductors from the Republic of Korea*, 68 Fed. Reg. 44290, 44291 (Dep't Commerce July 28, 2003) (amended final determination).

127. *Id.*

128. *Dynamic Random Access Memory Semiconductors from the Republic of Korea*, 68 Fed. Reg. 47546 (Dep't Commerce Aug. 11, 2003) (countervailing duty order).

129. *See* Request for the Establishment of a Panel, *United States—Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/2 (Nov. 21, 2003).

b. Certain Frozen Fish Fillets from the Socialist Republic of Vietnam

In its antidumping investigation of *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, Commerce determined that Vietnamese seafood producers were dumping catfish fillets in the U.S. market. During the course of the antidumping investigation, the first such investigation in the United States involving products from Vietnam, Commerce determined that Vietnam should be treated as a non-market economy. Accordingly, the normal value used for comparison with the U.S. prices of the Vietnamese seafood producers was calculated using information from the surrogate country of Bangladesh.[130] Based on this analysis, Commerce calculated dumping margins for the respondents ranging from 36.84 percent to 53.68 percent and a Vietnam-wide rate of 63.88 percent.[131] After the ITC's final affirmative injury determination, Commerce issued an antidumping duty order imposing duties at those rates on imports of catfish fillets from Vietnam.[132] The Vietnamese seafood producers have challenged both the final antidumping determination issued by Commerce and the ITC's final injury determination at the CIT.[133]

c. Certain Durum Wheat and Hard Red Spring Wheat from Canada

In this high-profile case, Commerce determined that Canadian growers of durum wheat and hard red spring wheat were dumping their merchandise in the United States at rates of 8.26 percent and 8.86 percent, respectively.[134] In the companion countervailing duty investigation, Commerce found that the Canadian Wheat Board was subsidizing both durum wheat and hard red spring wheat at a rate of 5.29 percent.[135] The ITC issued a mixed ruling, however, with a final affirmative injury determination for hard red spring wheat, and a negative determination for durum wheat.[136] Based on these determinations by the ITC, antidumping duties of 8.86 percent and countervailing duties of 5.29 percent were imposed only on imports of hard red spring wheat from Canada.[137] The petitioner in these investigations—the North Dakota Wheat Commission—has appealed the ITC's negative injury ruling on durum wheat from Canada at the CIT.[138] Similarly, the Canadian Wheat Board has filed two separate appeals under chapter 19 of the North American Free Trade Agreement (NAFTA) to challenge Commerce's countervailing duty determination and the ITC's affirmative injury determination with respect to hard red spring wheat exports.[139] Decisions in these appeals could be issued sometime in late 2004.

130. *See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 68 Fed. Reg. 37116, 37119–20 (Dep't Commerce June 23, 2003) (final determination).

131. *See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 68 Fed. Reg. 43713, 43715 (Dep't Commerce July 24, 2003) (amended final determination).

132. *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 68 Fed. Reg. 47909, 47910 (Dep't Commerce Aug. 12, 2003) (antidumping duty order).

133. *See* Complaint, *An Giang Agric. & Food Imp.t Exp. Co. v. United States*, (Case No. 03–00655) (Oct. 10, 2003); Complaint, *An Giang Agric. & Food Imp. Exp. Co. v. United States*, (Case No. 03–00563) (Aug. 20, 2003).

134. *Certain Durum Wheat and Hard Red Spring Wheat from Canada*, 68 Fed. Reg. 57666, 57667 (Dep't Commerce Oct., 6 2003) (amended final determination); *Certain Durum Wheat and Hard Red Spring Wheat from Canada*, 68 Fed. Reg. 52741, 52743–44 (Dep't Commerce Sept. 5, 2003) (final determination).

135. *Certain Durum Wheat and Hard Red Spring Wheat from Canada*, 68 Fed. Reg. 52747, 52749 (Dep't Commerce Sept. 5, 2003) (final determination).

136. *See* Durum and Hard Red Spring Wheat from Canada, USITC Pub. No. 3639, Invest. Nos. 701-TA-430A, 430B, 731-TA-1019A, 1019B, USITC Pub. No. 3639 (Oct. 2003) (Final).

137. *Certain Durum Wheat and Hard Red Spring Wheat from Canada*, 68 Fed. Reg. 60641, 60642 (Dep't Commerce Oct. 23, 2003) (antidumping duty order); *Certain Durum Wheat and Hard Red Spring Wheat from Canada*, 68 Fed. Reg. 60642 (Dep't Commerce Oct. 23, 2003) (countervailing duty order).

138. Complaint, *N. D. Wheat Comm'n v. United States*, Case No. 03–00838 (Dec. 19, 2003).

3. *Special Safeguard Proceedings Against China*

a. Special Textile Safeguard Proceedings

On July 24, 2003, groups representing the U.S. textile industry filed four petitions under the China-specific textile safeguard provision agreed to by China as part of its accession to the WTO. This special safeguard provision allows WTO members to restrict imports of textiles and apparel from China if surging imports are threatening to impede the orderly development of trade due to market disruption. The U.S. Committee for the Implementation of Textile Agreements (CITA), an interagency group chaired by Commerce, accepted three of the four petitions that were filed by the U.S. industry. Specifically, CITA accepted the petitions on knit fabric, brassieres, and dressing gowns, while rejecting the petition on gloves.[140]

On November 18, 2003, CITA determined that Chinese imports of knit fabric, brassieres, and dressing gowns were, due to market disruption and the threat of market disruption, threatening to impede the orderly development of trade in those products. CITA based its determination on the dramatic surge in imports of those products from China and their effect in depressing prices in the United States.[141] The decision marks the first time the China-specific textile safeguard has been utilized. As a result of this decision, the United States will restrain import growth in the three product categories to 7.5 percent above the level of imports in the first twelve of the preceding fourteen months. The quotas will remain in effect for the twelve month period of December 24, 2003 through December 23, 2004, but the U.S. industry can request that they be renewed. In addition, the Administration has sought consultations with China on trade in the three product categories, and the talks could lead to adjustments in the quota level or its duration.[142]

The Administration also will seek to begin broader negotiations with China on the issues of textile and apparel trade, with the hope of reaching a bilateral agreement covering those issues. U.S. textile industry representatives have pledged to continue filing petitions under the China-specific textile safeguard provision until a comprehensive bilateral agreement is

139. *See Certain Durum Wheat and Hard Red Spring Wheat from Canada*, Case No. USA-CDA-2003-1904-05 (Sept. 5, 2003) (NAFTA Panel Review Request); *Hard Red Spring Wheat from Canada*, Case No. USA-CDA-2003-1904-06 (Nov. 5, 2003) (Termination of Panel Review Request).

140. *See Solicitation of Public Comments on Request for Textile and Apparel Safeguard Action on Imports from China of Brassieres and Other Body Supporting Garments*, 68 Fed. Reg. 49448, 49448-49 (CITA Aug. 18, 2003); *Solicitation of Public Comments on Request for Textile and Apparel Safeguard Action on Imports from China of Robes, Dressing Gowns, etc.*, 68 Fed. Reg. 49444, 49444-45 (CITA Aug. 18, 2003); *Solicitation of Public Comments on Request for Textile and Apparel Safeguard Action on Imports from China of Knit Fabric*, 68 Fed. Reg. 49440, 49440-41 (CITA Aug. 18, 2003); *CITA Agrees to Consider Three Petitions Requesting Import Quotas on Chinese Textiles*, 20 Int'l Trade Rep. (BNA) No. 34 at 1412 (Aug. 21, 2003).

141. *See Announcement of Request for Bilateral Textile Consultations with the Government of the People's Republic of China and the Establishment of an Import Limit for Cotton and Man-Made Fiber Dressing Gowns and Robes, Category 350/650, Produced or Manufactured in the People's Republic of China*, 68 Fed. Reg. 74947, 74947-49 (CITA Dec. 29, 2003) (notice); *Announcement of Request for Bilateral Textile Consultations with the Government of the People's Republic of China and the Establishment of an Import Limit for Brassieres and Other Body Supporting Garments, Category 349/649, Produced or Manufactured in the People's Republic of China*, 68 Fed. Reg. 74945, 74945-47 (CITA Dec. 29, 2003) (notice); *Announcement of Request for Bilateral Textile Consultations with the Government of the People's Republic of China and the Establishment of an Import Limit for Knit Fabric, Category 222, Produced or Manufactured in the People's Republic of China*, 68 Fed. Reg. 74944, 74944-45 (CITA Dec. 29, 2003) (notice).

142. *See id.*

reached with China that covers all sensitive textile and apparel categories. This could lead to a flood of petitions when all quotas are removed on textiles and apparel on January 1, 2005 pursuant to the WTO's Agreement on Textiles and Clothing.[143]

b. Special Safeguard Proceedings for Other Products

As another sign of growing trade tensions with China, several petitions were also filed by U.S. companies seeking relief under the China-specific safeguard for other products. The petitions were filed under section 421 of the Trade Act of 1974, which was added by the legislation providing China with permanent normal trade relations (PNTR) status. Under this China-specific safeguard provision, U.S. companies are entitled to relief if the ITC determines that the products being investigated are being imported into the United States from China in such increased quantities as to cause or threaten market disruption to producers of like or directly competitive products.[144] As with global safeguard investigations under section 201 of the Trade Act of 1974, the President has the final say on whether to provide relief to the domestic industry. However, he can reject such relief only if he finds that the imposition of quotas or other import relief "is not in the national economic interest of the United States" because it would have "an adverse impact on the United States economy clearly greater than the benefits of such action" or, in extraordinary cases, that the taking of such action would cause serious harm to the national security of the United States.[145]

Of the four petitions filed thus far seeking relief under this China-specific safeguard provision, three have been unsuccessful and one remains pending before the President. In the first two cases, the ITC made affirmative determinations that imports of pedestal actuators and wire hangers from China were causing market disruptions for U.S. producers and recommended relief in the form of quotas or increased tariffs. Nevertheless, the President rejected relief in both cases, finding that such relief "is not in the national economic interest of the United States."[146] In the third case, the ITC determined that imports of brake drums and rotors from China were not being imported in such increased quantities as to cause or threaten market disruption in the United States and, therefore, rejected the petition.[147] Finally, in the fourth case, the ITC made an affirmative determination with respect to imports of ductile iron waterworks fittings and recommended a tariff-rate quota on such imports, but the President has yet to issue a final determination.[148] A negative determination by the President in this case could cause U.S. companies to be less likely to file cases under this China-specific safeguard provision.

143. *See Bush Administration to Restrain Textile and Apparel Imports from China*, 20 Int'l Trade Rep. (BNA) No. 46 at 1898 (Nov. 20, 2003).

144. 19 U.S.C. § 2451(a) (2003).

145. 19 U.S.C § 2451(k).

146. *See United States Denies Industry Request to Place Tariffs on Chinese Wire Hangers*, 20 Int'l Trade Rep. (BNA) No. 18 at 767 (May 1, 2003); *ITC Makes Affirmative Ruling in Wire Hanger Safeguard Case*, 20 Int'l Trade Rep. (BNA) No. 5 at 241 (Jan. 30, 2003); *Bush Denies Pedestal Actuator Import Limit in First Use of China-Specific Safeguards*, 20 Int'l Trade Rep. (BNA) No. 4 at 177 (Jan. 23, 2003).

147. *ITC Ends Safeguard Case on Brake Drums and Rotors from China*, 20 Int'l Trade Rep. (BNA) No. 32 at 1351 (Aug. 7, 2003).

148. *ITC Recommends Three-Year TRQ on Imports of Chinese Waterworks Fittings*, 20 Int'l Trade Rep. (BNA) No. 50 at 2074 (Dec. 18, 2003).

4. *Market Economy Determinations—Bulgaria, Estonia, Lithuania, and Romania*

In 2003, Commerce granted market economy status to Bulgaria, Estonia, Lithuania, and Romania effective January 1, 2003.[149] The market economy determinations for these countries have two important consequences. First, Commerce will now use respondents' actual prices and costs, rather than using surrogate country price and cost data, to calculate normal value in antidumping cases involving those countries. Second, petitioners will now be able to bring cases against Bulgaria, Estonia, Lithuania, and Romania under the U.S. countervailing duty law.[150]

B. CIT AND FEDERAL CIRCUIT DECISIONS

1. *Timken Co. v. United States and Corus Staal BV v. U.S. Department of Commerce—Zeroing*

In its decisions in *Timken Co. v. United States* and *Corus Staal BV v. U.S. Department of Commerce*, the CIT addressed and rejected challenges to Commerce's so-called "zeroing" methodology for calculating dumping margins.[151] The respondents in these cases argued that in calculating a company's overall dumping margin, Commerce is required to offset the positive margins calculated for certain products or transactions by the negative margins calculated for other products or transactions. Rather than doing this, Commerce employed a methodology that treats any negative margins calculated for certain products or transactions as "zero" margins. The respondents relied on language in the WTO Anti-Dumping Agreement and the decisions by the WTO Panel and Appellate Body in *European Communities—Antidumping Duties on Imports of Cotton-Type Bed Linen from India (EC—Bed Linen)* in arguing that Commerce's methodology was contrary to U.S. international obligations and should be reversed. The CIT disagreed and upheld Commerce's methodology. While it declined to find that zeroing was required by the plain language of the U.S. antidumping statute, the CIT did find that Commerce's interpretation of the statute as permitting zeroing was reasonable and should be upheld.[152]

The Federal Circuit affirmed the CIT's decision in the *Timken* case.[153] While calling it a "close question," the Federal Circuit stated that it was "reluctant" to find that the plain language of the U.S. statute required zeroing. Nevertheless, it held that "Commerce based

149. *See* Memorandum from Shauna Lee-Alaia to Faryar Shirzad, Regarding Estonia's Status as a Non-Market Economy Country for Purposes of the Antidumping and Countervailing Duty Law Under a Changed Circumstances Review of the Solid Urea Order Against Estonia (Feb. 28, 2003) at 2, 20 (Public Document); Memorandum from Barbara Mayer, et al to Faryar Shirzad Regarding Lithuania's Status as a Non-Market Economy Country for Purposes of the Antidumping and Countervailing Duty Law Under a Changed Circumstances Review of the Solid Urea Order Against Lithuania (Feb. 28, 2003) at 2, 21 (Public Document); Memorandum from Lawrence Norton, et al to Joseph A. Spetrini Regarding Antidumping Duty Administrative Review of Certain Small Diameter Carbon and Alloy Seamless, Standard, Line and Pressure Pipe from Romania—Non-Market Economy Status Review (Mar. 10, 2003) at 2, 28 (Public Document); *U.S. Decides to Recognize Bulgaria as Market Economy Under Antidumping Law*, 20 Int'l Trade Rep. (BNA) No. 10 at 441 (Mar. 6, 2003).

150. *See U.S. Decides to Recognize Bulgaria as Market Economy Under Antidumping Law*, *supra* note 149; *Evans Announces Romania Granted Market Economy Status*, 20 Int'l Trade Rep. (BNA) No.12 at 531 (Mar. 20, 2003).

151. *See Corus Staal BV v. U.S. Dep't of Commerce*, 259 F. Supp. 2d 1253 (Ct. Int'l Trade 2003); *Timken Co. v. United States*, 240 F. Supp. 2d 1228 (Ct. Int'l Trade 2002).

152. *See Corus Staal BV*, 259 F. Supp. 2d at 1261–65; *Timken Co.*, 240 F. Supp. 2d at 1242–44.

153. *See Timken Co. v. United States*, 2004 U.S. App. LEXIS 627 (Fed. Cir. 2004).

its zeroing practice on a reasonable interpretation of the statute."[154] The court also rejected the respondent's arguments regarding the *EC—Bed Linen* case wherein the WTO Panel and Appellate Body rejected the use of zeroing by the EC. The Federal Circuit distinguished the *EC—Bed Linen* case on the basis that it did not involve the United States and that it dealt with an antidumping investigation, rather than an administrative review.[155] The *Corus* case has also been appealed to the Federal Circuit and will raise the issue of zeroing in the context of an antidumping investigation. A decision could be issued by the Federal Circuit in the *Corus* case in 2004.

2. *Nippon Steel Corp. v. United States—Adverse Facts Available*

This appeal arose out of the antidumping investigation of hot-rolled steel from Japan. In the investigation, Commerce applied partial adverse facts available to Nippon Steel Corporation (Nippon) because of its failure to provide requested data in a timely manner. In a series of decisions, the CIT overturned Commerce's determination on that issue. However, the Federal Circuit reversed, finding that the application of adverse facts available was in accordance with law because Commerce had properly concluded that Nippon failed to act to the best of its ability in providing the requested information.[156]

The Federal Circuit determined that the statutory trigger for the application of adverse facts available under 19 U.S.C. § 1677e(b) is a respondent's failure to cooperate to the best of its ability, regardless of motivation or intent.[157] To conclude that a respondent has not cooperated to the best of its ability, the court held that Commerce need only make two showings. First, it must make an objective showing that a reasonable and responsible company would have known that the requested information was required to be kept and maintained under the applicable statutes, rules, and regulations. Second, it must make a subjective showing that the respondent not only has failed to promptly produce the requested information, but also that the failure to do so is the result of the respondent's lack of cooperation in either: (1) failing to keep and maintain all required records; or (2) failing to put forth its maximum efforts to investigate and obtain the requested information from its records. As the court recognized, a respondent's inadequate inquiries into its records, like that performed by Nippon in this case, may suffice. As a final matter, the Federal Circuit rejected the CIT's requirement that Commerce show that Nippon made more than "a simple mistake" or exercised a "lack of due regard for its responsibilities in the investigation" to be able to apply adverse facts available.[158] It determined that these requirements had no basis in the statute.[159]

3. *FAG Kugelfischer Georg Schafer AG v. United States—Different Definitions of "Foreign Like Product" for Price Purposes and the Constructed Value Calculation*

In this decision, the Federal Circuit finally resolved the question of whether Commerce's longstanding methodology for calculating constructed value (CV) profit is consistent with the U.S. antidumping statute. The respondents challenged Commerce's use of different

154. *Id.* at *15.
155. *Id.* at *23–*24.
156. *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1384 (Fed. Cir. 2003).
157. *Id.* at 1383.
158. *Id.* at 1382–83.
159. *Id.* at 1383.

definitions of "foreign like product" under the statute for determining the appropriate home market prices which to compare U.S. prices and for determining the amount of profit to use as CV profit. Where possible, Commerce compares U.S. sales prices to home market prices for merchandise that is identical or similar to the U.S. product. Where this is not possible, Commerce compares U.S. sales prices to CV. In calculating CV, Commerce includes an element for CV profit that is calculated based on aggregate data for all "foreign like products," rather than calculating a different CV profit for each model or for particular types of products within the "foreign like product" category. In 2001, the Federal Circuit directed the CIT to remand this case to Commerce to provide a reasonable explanation as to "why it uses different definitions of 'foreign like product' for price purposes and when calculating constructed value."[160] In March 2002, Commerce issued a redetermination explaining its use of the different definitions, which was subsequently upheld by the CIT.[161] This appeal to the Federal Circuit followed.

The Federal Circuit also upheld Commerce's redetermination and its explanation of its use of the different definitions of "foreign like product."[162] The court determined that price comparisons between U.S. and home market prices require comparisons between identical or similar models. In contrast, the Court determined that "CV profit may be based on a broader scope of products because use of aggregate data . . . results in a practical measure of profit that can be applied consistently and with administrative ease over the range of included products."[163] Accordingly, the court held that Commerce's use of aggregate sales within the same level of trade and class, or kind of merchandise to calculate CV profit was reasonable and appropriate.[164]

C. NAFTA Binational Panel Decisions

1. *Softwood Lumber from Canada Antidumping Determination*

In this appeal of Commerce's final antidumping determination in softwood lumber from Canada, the NAFTA Binational Panel issued a split decision. The Panel ruled that Commerce erred in not taking into account physical differences between various softwood lumber products when making price comparisons and calculating dumping margins for the Canadian respondents. Specifically, the Panel held that Commerce improperly failed to make a difference in merchandise (DIFMER) adjustment to take into account differences in physical characteristics such as thickness, size, and length when comparing the prices of products sold in the United States to the prices of products sold in Canada.[165] The Panel also found that Commerce made a number of errors in its calculation of certain costs for specific Canadian respondents. The Panel remanded a total of thirteen issues back to Commerce.[166] Commerce issued its remand determination to implement the Panel's decision

160. *SKF USA Inc. v. United States*, 263 F.3d 1369, 1382 (Fed. Cir. 2001); *FAG Kugelfischer Georg Schafer AG v. United States*, 2001 Ct. Intl. Trade LEXIS 144 (Nov. 15, 2001).

161. *SKF USA Inc. v. United States*, 2002 Ct. Intl. Trade LEXIS 65, (July 12, 2002); *FAG Kugelfischer Georg Schafer AG v. United States*, 2002 Ct. Intl. Trade LEXIS 64, (July 12, 2002).

162. *See FAG Kugelfischer Georg Schafer AG v. United States*, 332 F.3d 1370, 1373–74 (Fed. Cir. 2003).

163. *Id.* at 1373.

164. *Id.* at 1373–74.

165. *See* Decision of the Panel, *In the Matter of Certain Softwood Lumber Products From Canada: Final Affirmative Antidumping Determination*, July 17, 2003, Secretariat File No. USA-CDA-2002-1904-02 at 56, 186.

166. *See id.* at 185–188.

with respect to those issues on October 16, 2003. The remand determination remains pending before the Panel.

On the other hand, the Panel upheld Commerce's initiation of the antidumping investigation.[167] It also affirmed Commerce's determination that certain products, including Western Red Cedar and Eastern White Pine, did not represent a separate "class or kind" of merchandise under U.S. law.[168] Further and perhaps most importantly, the Panel held that Commerce's use of zeroing was a permissible application of the U.S. statute and that WTO decisions like that in *EC—Bed Linen* are not binding upon Commerce or the Panel.[169]

2. *Softwood Lumber from Canada Countervailing Duty Determination*

The NAFTA Panel issued another split decision in this case with respect to Commerce's final countervailing duty determination in softwood lumber from Canada. In a key victory for the United States, the Panel affirmed Commerce's determination that Canada's provincial stumpage programs constitute a "financial contribution" and are "specific" under the U.S. countervailing duty statute.[170] Nonetheless, the Panel rejected Commerce's use of cross-border benchmarks for purposes of determining whether the stumpage programs provide timber to Canadian softwood lumber producers for less than adequate remuneration. Although the Panel agreed with Commerce's decision not to use internal Canadian timber prices as a possible benchmark, it went on to reject Commerce's cross-border comparison of U.S. and Canadian timber prices.[171] The Panel noted that Commerce had rejected the use of cross-border comparisons in previous lumber cases and stated that Commerce had not offered an adequate explanation for its reversal from these previous determinations. Furthermore, the Panel found that Commerce had not presented substantial evidence to support the notion that market conditions in Canada and the United States are comparable, nor that the adjustments made by Commerce adequately account for any differences in such conditions.[172] Accordingly, it held that "[b]y basing its price comparison on prices in the U.S., adjusted inadequately to account for differences in Canadian market conditions, Commerce has construed the statute in a manner that is contrary to law."[173] Commerce issued its remand determination to implement the Panel's decision in this case on January 12, 2004, and that determination is currently pending before the Panel.

3. *Softwood Lumber from Canada Injury Determination*

In the final trilogy of decisions issued in 2003 with respect to softwood lumber, the NAFTA Binational Panel in this case rejected the ITC's determination that the U.S. industry was threatened with material injury by reason of dumped and subsidized imports of softwood lumber from Canada.[174] The Panel determined that the ITC did not have suffi-

167. *Id.* at 21.

168. *See id.* at 157, 162, 179.

169. *Id.* at 60–61.

170. *See* Decision of the Panel, *In the Matter of Certain Softwood Lumber Products From Canada: Final Affirmative Countervailing Duty Determination*, Aug. 13, 2003, Secretariat File No. USA-CDA-2002-1904-03 at 20, 39.

171. *See id.* at 27, 35.

172. *Id.* at 32–33.

173. *Id.* at 34.

174. *See* Decision of the Panel, *In the Matter of Certain Softwood Lumber Products From Canada: Final Affirmative Threat of Material Injury Determination*, Sept. 5, 2003, Secretariat File No. USA-CDA-2002-1904-07 at 110.

cient evidence to support its finding that U.S. producers were threatened with injury from rising Canadian imports. Critical to the Panel's determination on this issue was its finding that the ITC had failed to cite any evidence to show that there had been a significant rate of increase in the volume or market penetration of imports of softwood lumber from Canada.[175] The Panel also found that the ITC had not cited any evidence to show that there was an imminent, substantial production increase in Canada that would lead to increased imports from that country in the future.[176] Additionally, the Panel held that the ITC failed to ensure that it did not attribute to subject imports threatened injury from other sources. In this regard, the Panel found that the ITC failed to take into account the practices of the domestic industry itself, third-country imports, the growth of engineered wood products, constraints on domestic production in the United States, and the cyclical nature of the softwood lumber industry in making its injury determination.[177] Based on these deficiencies in the ITC's injury determination, the Panel held that the determination was unsupported by substantial evidence and not in accordance with law.[178]

V. Legislative Activity

Despite having a number of items on its trade agenda for 2003,[179] Congress' action on trade legislation for 2003 was relatively limited. By the end of the year, the implementing bills for the FTAs concluded with Chile and Singapore in 2002 were the only major trade legislation enacted into law. Congress also approved, and President Bush signed into law, legislation banning trade in so-called "conflict diamonds," legislation imposing sanctions on Syria and Burma, and legislation reauthorizing the Overseas Private Investment Corporation (OPIC). Congress failed, however, to move on several pieces of legislation left over from the previous legislative session that had been designated for possible action. Specifically, legislative efforts to move on a miscellaneous tariff bill stalled in the Senate, and an effort to extend permanent "most favored nation" status to Russia in advance of its accession to the WTO suffered a similar fate. Congress also failed to act on a bill to reauthorize the Export Administration Act (EAA).

A. Implementing Legislation for the Chile and Singapore FTAs

The negotiations for comprehensive FTAs with Singapore and Chile were concluded at the end of 2002. President Bush notified members of Congress of his intent to sign the FTAs with Singapore and Chile on January 30, 2003, setting in motion a ninety day period of congressional review before the agreements could be signed under the procedures required by the trade promotion authority provisions of the Trade Act of 2002.[180] Following criticism from congressional Democrats, the United States and Singapore agreed to change

175. *See id.* at 68–70.

176. *See id.* at 65–68.

177. *See id.* at 100–107.

178. *Id.* at 110.

179. *See Trade Subcommittee Members See Full Agenda in 108th Congress*, 20 Int'l Trade Rep. (BNA) No. 6 at 266 (Feb. 6, 2003); *Grassley Sees Priorities in Chile FTA, Doha Oversight and Tax Laws*, Inside U.S. Trade (Jan. 3, 2003), *at* http://www.insidetrade.com.

180. *President Notifies Chile, Singapore FTAs; Zoellick Sees Fall Passage*, Inside U.S. Trade (Jan. 31, 2003), *at* http://www.insidetrade.com.

their bilateral FTA prior to its signing to curtail the so-called Integrated Sourcing Initiative (ISI). The ISI would have allowed specified products from third countries such as China to be treated as if they originated in the United States or Singapore and therefore, to receive preferential tariff access under the FTA.[181] The signing of the U.S.-Chile FTA was delayed by disputes over exceptions in the agreement for the use of copyrighted products and Chile's SPS barriers to U.S. exports of pork, poultry, beef, and dairy products.[182] Even after these disputes were resolved, the signing of the agreement with Chile was delayed by the United States in what some believed was retaliation for Chile's refusal to support the U.S. position on Iraq in the United Nations.[183] Nevertheless, after congressional review of the agreements was complete, President Bush signed the FTA with Singapore on May 6 and the FTA with Chile on June 6.[184]

Thereafter, President Bush sent draft implementing bills for both FTAs to Congress in June 2003. Several changes were made to the draft implementing bills to address serious concerns raised by members of Congress. Specifically, even after receiving assurances from the Administration that the ISI in the Singapore FTA could not be used as a backdoor for third countries to gain access to the benefits of that agreement, Congress changed the implementing bill to make an expansion of the ISI subject to congressional approval. In addition, Congress made changes in the implementing bills for both the Singapore and Chile FTAs to ensure that the President could not proclaim tariff cuts other than those needed to implement the agreements without consulting a number of interested parties, including the Senate Finance and House Ways and Means Committees.[185] Furthermore, the House Judiciary Committee significantly changed visa provisions in the implementing bills regulating the entry of professionals from Singapore and Chile.[186]

With these changes, both pieces of legislation were approved in the Senate on July 31, by a vote of 66 to 32 for the Singapore FTA and 66 to 31 for the Chile FTA. A week before the Senate vote, the House of Representatives approved the two bills by a vote of 272 to 155 on the Singapore FTA and a vote of 270 to 156 for the Chile FTA.[187] On September 3, President Bush signed the United States-Singapore Free Trade Agreement Implementation Act and the United States-Chile Free Trade Agreement Implementation Act into law.[188]

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181. *U.S. Strikes Controversial Text from Singapore FTA Before Signing*, INSIDE U.S. TRADE (May 23, 2003), *at* http://www.insidetrade.com.

182. *USTR Still Negotiating on IPR in Chile FTA, Working on SPS Problems*, INSIDE U.S. TRADE (Feb. 14, 2003), *at* http://www.insidetrade.com.

183. *See Zoellick Hopeful Chile FTA Will Be Signed Due to Critics' Pressure*, INSIDE U.S. TRADE (May 23, 2003), *at* http://www.insidetrade.com; *U.S. Fails to Move on Chile Deal, Some Fear War Impact*, INSIDE U.S. TRADE (Apr. 4, 2003), *at* http://www.insidetrade.com.

184. *See* White House Press Release, *President Signs U.S.-Singapore Free Trade Agreement*, *available at* http://www.whitehouse.gov/news/releases/2003/05/ 20030506–11.html (last visited Jan. 30, 2004); USTR Press Release, *United States and Chile Sign Historic Free Trade Agreement*, *available at* http:// www.ustr.gov/releases/ 2003/06/03–37.pdf (last visited Jan. 30, 2004).

185. *Trade Committees Approve Chile, Singapore FTAs, Floor Vote Imminent*, INSIDE U.S. TRADE (July 18, 2003), *at* http://www.insidetrade.com; *Trade Committees Approve Chile FTA Bill, Differ on Singapore Deal*, INSIDE U.S. TRADE (July 11, 2003), *at* http://www.insidetrade.com.

186. *See id.*; *House Committee Amends Visa Plan in FTAs, Vows to Never Pass Another*, INSIDE U.S. TRADE (July 11, 2003), *at* http://www.insidetrade.com.

187. *Senate Approves Singapore, Chile FTAs After Passing Energy Bill*, INSIDE U.S. TRADE (Aug. 1, 2003), *at* http://www.insidetrade.com.

188. *See* United States-Singapore Free Trade Agreement Implementation Act, Pub. L. No. 108–78, 117 Stat. 948 (2003); United States-Chile Free Trade Agreement Implementation Act, Pub. L. No. 108–77, 117

B. Clean Diamond Trade Act

President Bush signed the Clean Diamond Trade Act into law on April 25, 2003.[189] This law enables the United States to implement procedures necessary to carry out the Kimberley Process Certification Scheme (Kimberley Process) developed by more than fifty countries to exclude conflict diamonds from international trade. Trade in conflict diamonds has been used by rebel groups and their allies in Africa to finance conflict aimed at undermining legitimate governments and to commit horrifying atrocities against civilian populations.[190] The Clean Diamond Trade Act is designed to ensure that the United States only deals in rough diamonds from countries participating in the Kimberley Process and requires the President prohibit the importation into, or exportation from, the United States of any rough diamond that has not been controlled through the Kimberley Process.[191] At the request of the United States and several other countries, the WTO General Council formally waived application of the WTO trade rules to legislation banning trade in conflict diamonds.[192]

C. Syria Accountability and Lebanese Sovereignty Restoration Act of 2003

On December 12, 2003, President Bush signed into law legislation providing for the imposition of sanctions against Syria. The House and Senate overwhelmingly approved the Syria Accountability and Lebanese Sovereignty Restoration Act of 2003. This act requires the President to impose economic sanctions against Syria if it refuses to withhold its support for terrorism and take a number of other steps, including withdrawing its troops from Lebanon.[193] Specifically, the legislation requires the President to prohibit exports to Syria of dual-use goods and technology that can be used for military or commercial purposes. It also requires the President to impose two or more additional sanctions, which could include banning all exports to Syria and prohibiting U.S. companies from investing or operating in the country.[194] However, the legislation also provides the President authority to waive some or all of the sanctions if he determines that it is in the U.S. national security interest to do so.[195] U.S. businesses strongly urged President Bush to exercise this waiver, arguing that sanctions against Syria would have a severe adverse effect on U.S. companies operating in the country.[196]

Stat. 909 (2003); White House Press Release, *President Bush Signs Chile, Singapore Free Trade Agreement Bills, available at* http://www.whitehouse.gov/news/releases/2003/09/20030903-3.html (last visited Jan. 30, 2004).

189. White House Press Release, *Statement by the President, available at* http://www.whitehouse.gov/news/releases/2003/04/20030425-9.html (last visitedJan. 30, 2004).

190. *Id.*; Clean Diamond Trade Act, Pub. L. No. 108-19, § 2, 117 Stat. 631 (2003).

191. Clean Diamond Trade Act § 4.

192. *WTO Members Approve Waivers for Agreement on "Blood Diamonds,"* WTO Reporter (May 16, 2003).

193. *President Signs Syria Sanctions Bill But Offers No Clue on Possible Waiver*, 20 Int'l Trade Rep. (BNA) No. 49 at 2079 (Dec. 18, 2003).

194. Syria Accountability and Lebanese Sovereignty Restoration Act of 2003, Pub. L. No. 108-175, § 5(a), 117 Stat. 2482 (2003).

195. *Id.* § 5(b).

196. *President Signs Syria Sanctions Bill But Offers No Clue on Possible Waiver*, *supra* note 193, at 2079.

D. Burmese Freedom and Democracy Act of 2003

The Burmese Freedom and Democracy Act of 2003 was signed into law by President Bush on July 28, 2003.[197] The law bans the importation of any product from Burma into the United States.[198] This import ban expires after one year, but may be renewed by Congress each year for a maximum of three years from the date of enactment. In addition to the import ban, the legislation freezes the assets of the Burmese government and its leaders in the United States, extends a ban on U.S. visas for current and former Burmese leaders, and maintains the U.S. policy of opposing aid to Burma from international financial institutions such as the World Bank and the International Monetary Fund.[199] President Bush also imposed additional sanctions against Burma in an executive order issued on July 28, 2003. In particular, Executive Order 13310 prohibits any U.S. entity from providing financial services to Burma and bans the remittance of personal funds to Burma, except for humanitarian purposes.[200]

E. OPIC Reauthorization

Legislation reauthorizing OPIC was signed into law on December 3, 2003. The legislation extends OPIC's authority and renews its charter through September 30, 2007.[201] It also makes several largely technical changes to OPIC's charter. For example, it enables OPIC's political risk insurance to cover expropriation and other acts by an entity owned or controlled by a foreign government, and not just expropriation by the foreign government itself.[202] In addition, the legislation allows OPIC to issue loan guarantees in currencies other than U.S. dollars.[203]

F. Miscellaneous Tariff Bill

Following House approval of the miscellaneous tariff bill in November 2003, a Senate version of the bill remained mired in controversy with a number of Senators preventing it from going forward for different reasons. A hold had been placed on the legislation for over a year by Senator Richard Shelby (R-AL) because of concerns regarding its impact on sock producers in his state. However, the House version of the bill addressed Senator Shelby's demands as to country-of-origin labeling and retroactive duty refunds for socks that are assembled in other countries and shipped to the United States.[204] Although the

197. *Bush Signs Burma Sanctions Bill, Calls for Cooperation from Region*, 20 Int'l Trade Rep. (BNA) No. 31 at 1309 (July 31, 2003).

198. Burmese Freedom and Democracy Act of 2003, Pub. L. No. 108-61, § 3(a), 117 Stat. 864 (2003).

199. *See id.* §§ 4–6.

200. Blocking Property of the Government of Burma and Prohibiting Certain Transactions, 68 Fed. Reg. 44853 (July 30, 2003).

201. Overseas Private Investment Corporation Amendments Act of 2003, Pub. L. No. 108-158, § 2, 117 Stat. 1949 (2003).

202. *See id.* § 4.

203. *See id.* § 5.

204. *See Senate Tariff Bill Remains Mired in Holds After House Approval*, Inside U.S. Trade (Nov. 28, 2003), *at* http://www.insidetrade.com.

legislation has now cleared Republican objections, it still faces several holds from Democratic Senators. Senate Democrats seek non-trade related amendments to the legislation, such as an extension of unemployment insurance benefits and an increase in the minimum wage. Additionally, Democrats have threatened not to allow the bill, if approved by the Senate, to go to conference because they believe that the conference could be used to add new trade provisions to the bill that would implement various adverse WTO dispute settlement decisions, including the ruling on the Byrd Amendment.[205] The fate of the miscellaneous tariff bill remains uncertain.

G. Russia PNTR

The Bush Administration made yet another effort in 2003 to persuade Congress to grant PNTR status to Russia ahead of its accession to the WTO. In this regard, Senate Foreign Relations Committee Chairman Richard Lugar (R-IN) introduced a bill in March 2003 to grant PNTR status to Russia. The bill would waive the provisions of the Jackson-Vanik amendment to the Trade Act of 1974 that require Congress to authorize the extension of normal trade relations to nonmarket economies on an annual basis. Waiving these provisions for Russia would mean that its trade status would no longer be subject to annual review, and imports from Russia would receive essentially the same tariff treatment as other U.S. trading partners.[206] Senator Max Baucus and Representatives Charles Rangel and Sander Levin also introduced bills that would grant Russia PNTR status. However, the bills in question included a provision that would require a separate congressional vote to approve or reject Russia's bid to join the WTO.[207]

The bills introduced to grant PNTR status to Russia failed to move forward in 2003 for several reasons. In particular, barriers imposed on U.S. poultry exports to Russia, other concerns about Russia's commitment to open its market to U.S. exports and service providers, and Russia's opposition to a United Nations resolution authorizing the use of force in Iraq all impeded efforts to grant PNTR status to Russia.[208] The prospects for granting PNTR status to Russia in 2004, a presidential election year, appear equally dim.[209]

H. Reauthorization of the EAA

While legislation was again introduced in 2003 to reauthorize the EAA, there was little support for the measure in Congress. Previous efforts to reauthorize the EAA since it expired in 1994 were opposed on national security grounds based on concerns that export

205. *Miscellaneous Trade Bill Stalled by New Democratic Holds*, Inside U.S. Trade (Jan. 2, 2004), *at* http://www.insidetrade.com.

206. *See Sen. Lugar Introduces Bill to Provide Permanent Normal Trade Status to Russia*, 20 Int'l Trade Rep. (BNA) No. 11 at 466 (Mar. 13, 2003); *Russia to Press for Normalized Trade Relations*, 20 Int'l Trade Rep. (BNA) No. 3 at 130 (Jan. 16, 2003).

207. *See Lugar Casts Doubt on Russia's Removal from Jackson-Vanik Next Year*, Inside U.S. Trade (Nov. 21, 2003), *at* http://www.insidetrade.com; *Russian Official Admits WTO Accession Unlikely This Year, Despite Earlier Optimism*, *supra* note 13, at 673.

208. *See id.*; *Key Democrats Announce Plans to Introduce Bill Providing PNTR to Russia*, 20 Int'l Trade Rep. (BNA) No. 4 at 172 (Jan. 23, 2003).

209. *See Lugar Casts Doubt on Russia's Removal from Jackson-Vanik Next Year*, *supra* note 206.

control reform would make it more likely that dual use technologies would fall into the hands of regimes opposed to the United States, including Iraq. Such concerns were heightened in 2003 due to the U.S.-led war in Iraq and continuing concerns over terrorism.[210] Given the lack of action on reauthorizing the EAA, the existing authority for export controls continues to be the International Emergency Economic Powers Act.[211]

210. *See Dreier Sees Little Chance for Renewal of Export Administration Act*, INSIDE U.S. TRADE (Apr. 11, 2003), *at* http://www.insidetrade.com; *Once More Into the Breach for EAA Legislation*, 20 Int'l Trade Rep. (BNA) No. 3 at 145 (Jan. 16, 2003).

211. *See Commerce Official Signals Openness to Alternative EAA Approaches*, INSIDE U.S. TRADE (May 2, 2003), *at* http://www.insidetrade.com.